United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

77-1031

To be argued by
THOMAS P. SMITH

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1031

UNITED STATES OF AMERICA,
Appellee,

—v.—

ARLO LEWIS,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF AND APPENDIX FOR THE APPELLEE

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TABLE OF CONTENTS

TABLE OF CASES

PAGE

SECONDARY AUTHORITIES

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BRIEF FOR THE APPELLEE

Statement of the Case

A Grand Jury in Hartford returned a single count indictment on September 17, 1976, charging the appellant Arlo Lewis, and one Wayne X. Brown, with bank robbery in violation of Title 18, United States Code, section 2113(a). The appellant shortly thereafter moved to suppress several statements made by him to local and federal law enforcement officers, including a written confession, on the day of his arrest.

On November 2nd and 4th, 1976, a hearing on appellant's motion was held by the Honorable M. Joseph Blumenfeld, United States District Judge, who reserved decision. Eleven witnesses, including Arlo Lewis, testified at that hearing.

In an oral ruling on December 9, 1976, later followed by a 30-page written decision appearing at — F. Supp.

— (D. Conn. 1976), the Court denied appellant's motion to suppress his written confession to the Federal Bureau of Investigation. After the delivery of that oral ruling, the appellant pleaded guilty to a substitute information, charging a violation of Title 18, United States Code, section 2113(b), and reserved his right to appeal the denial of his suppression motion.[1]

The government's case against the appellant was thereupon severed from that against his co-defendant Wayne X. Brown, who was later tried before a jury and convicted. Appellant Lewis testified as a government witness at that trial under a grant of immunity.

This appeal from the Court's suppression ruling followed the appellant's sentencing, on January 3, 1977, to a three year term of imprisonment.

Statute Involved

28, United States Code, Rule 52(a), Federal Rules of Civil Procedure:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or

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[1] The procedure of pleading guilty, while reserving the right to appeal an adverse suppression ruling, has previously been approved by this Court. See *United States* v. *Rothberg*, 480 F.2d 534, 535 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973); *United States* v. *Doyle*, 348 F.2d 715, 719 (2d Cir. 1965); *United States* v. *Faruolo*, 506 F.2d 490, 491, n.2 (2d Cir. 1975) (Mulligan, *J.*). See also, *United States* v. *Burke*, 517 F.2d 377 (2d Cir. 1975) (Friendly, *J.*). In the instant case, as in *Burke*, the government expressly consented to this procedure with the approval of the District Court.

refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as he findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Issues

1. Does a sworn affidavit, which sets forth the fact that an eyewitness-victim has identified a photograph of a suspect as depicting one of the two robbers who committed an armed bank robbery in the witness-victim's presence, provide probable cause for the issuance of a warrant to arrest that suspect?

2. Does the innocent failure of a police officer affiant to indicate that certain persons whom he interviewed were unable to make any identification from a photographic spread invalidate an arrest warrant based in part upon a photographic identification which one eyewitness was able to make?

3. Are the detailed factual findings of the District Court that the appellant voluntarily, knowingly, and intelligently gave an oral and written confession to an FBI agent "clearly erroneous"?

Statement of the Facts

On July 10, 1976, two young Black males, one of whom brandished a gun, robbed the Windsor branch of the United Bank and Trust Company, a federally-insured bank taking approximately $2,147. (Tr. 4).[2] By the time Windsor, Connecticut, police detective Everett Overstrom and agents of the Federal Bureau of Investigation arrived at the bank, the robbers had fled and, hence, no one was arrested at the scene.

During an investigation subsequently conducted by Detective Overstrom, a photographic spread containing a picture of Arlo Lewis was compiled and displayed to bank personnel and witnesses present during the robbery. In addition, the spread was shown to two other individuals: a bank teller who was not present during the robbery, but had reported seeing two Black males at the bank on the evening before the robbery, and an employee of a neighboring store who recalled seeing the two Black males walking slowly in the general vicinity of the bank at approximately the same time of the robbery. Of a total of seven people, both witnesses and non-witnesses, to whom the photographic spread was shown, no one, with the exception of bank manager Joseph Lupacchino, was able to make an identification. (*See* Superseding Stipulation, ¶¶ 1-3; Appellant's Appendix 5b and 5c).

Joseph Lupacchino, who was present during the bank robbery, positively identified the photograph of Arlo Lewis as depicting one of the robbers. (Tr. 15). On the basis of Lupacchino's identification of Lewis, together with other corroborative information developed during the course of his investigation, Overstrom obtained a

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[2] References marked "(Tr. ...)" refer to the transcript of the suppression hearing on November 2nd and 4th, 1976.

state warrant for the arrest of Arlo Lewis on local robbery and larceny charges. That warrant, supported by Overstrom's affidavit, was obtained on July 16, 1976, and was executed the following day.

On Saturday morning, July 17, 1976, Detective Overstrom, accompanied by FBI Special Agents Harry Willis and David Miller, arrested Lewis at his Hartford apartment pursuant to the state arrest warrant. At the time of his arrest, Lewis was advised of his constitutional rights, not once, but twice. The first advise of rights was given by Detective Overstrom. The second was given shortly thereafter by Special Agent Miller, who wanted to "assure [himself] that [Lewis] had been advised of his rights." (Tr. 219). The appellant said nothing in response to these warnings. (District Court Ruling at 2).

Following his arrest, the appellant was taken to the Hartford Police Station, since the arrest had occurred in that City and since several Hartford warrants for Lewis' arrest were also outstanding. (Tr. 165). At 9:41 a.m., Lewis was again advised of his rights by Special Agent Willis in the "interrogation room" of the police station; and at 9:44 a.m. the appellant executed an "Interrogation Advice of Rights Form," acknowledging that he understood his rights. At that time Lewis stated that he "didn't want to say anything until [he] saw a lawyer." After this statemen, Special Agent Willis asked him when he had last seen Wayne Brown. Lewis responded that he had seen him last on the day of the robbery. No further questions were asked of Lewis at that time. Following the interview, Lewis was placed in a cell in the "lockup" of the Hartford police station. (District Court Ruling at 3).

At approximately 5:30 p.m. that afternoon, Lewis initiated a conversation in the "lockup" area with Hartford police detective Edgar Campbell, a Black police

officer whom Lewis knew from his neighborhood. Lewis began this conversation by asking Campbell to deliver a message to his [Lewis'] girlfriend. Campbell then asked what he was doing in the lockup, and Lewis responded that he had been arrested for the Windsor bank robbery. During the course of the ensuing conversation, Campbell, who was not investigating the Windsor bank robbery, mentioned that he had seen "a beautiful photograph of the bank holdup", and that the Windsor police officers had mentioned that they wanted him for the bank robbery. (Tr. 198-200). Although he urged Lewis to cooperate, Campbell did not advise him of his rights at this, or any other juncture, because on at least ten instances during the conversation Lewis specifically stated that he had already confessed everything to the FBI, except as to the possible whereabouts of the stolen bank funds and the gun used by his accomplice. (Tr. 188-189). During the course of this conversation Lewis fully admitted his participation in the bank robbery. The conversation with Campbell concluded at approximately 6:15 p.m. At no time did Campbell give Lewis *Miranda* warnings. (District Court Ruling at 4).

At the end of the conversation with Campbell, Lewis handed Campbell the business card of FBI Agent Harry Willis (Tr. 191), and asked Campbell to inform Willis that he wanted to talk to him. Campbell was reluctant to call Agent Willis at home, but agreed to contact the Windsor Police Department, which in turn contacted Special Agent David Miller (not being able to reach Willis). (District Court Ruling at 5).

At 7:55 p.m., prior to Agent Miller's arrival, Lewis was treated by Doctor Louis Tonken, a physician with the Hartford Police Department, who administered to Lewis 20 milligrams of methadone, the normal treatment

given to narcotics addicts. At that time Lewis neither complained of pain nor appeared to be suffering from advanced withdrawal symptoms. (Tr. 38-40). (District Court Ruling at 5).

Special Agent David Miller finally arrived at the Hartford Police Department at approximately 8:20 p.m., and immediately advised Lewis of his rights. At 8:30 p.m., Lewis executed a second "Interrogation Advice of Rights Form." [3] During the ten-minute period between his arrival and Lewis' execution of the advice of rights form, Miller discussed the form with Lewis. In view of Lewis' earlier desire not to make a statement until he had first consulted with counsel, Miller wanted to assure himself that "Lewis realized exactly what he was doing." (Tr. 227). Miller also inquired into Lewis' physical condition. Based upon his discussion with Lewis, Miller concluded that he was in full possession of his faculties. (District Court Ruling at 5).

Following the execution of the "Interrogation Advice of Rights Form," Lewis confessed to Miller about his participation in the bank robbery. These statements were transcribed and, after reading them, were signed by Lewis at 10:04 p.m.[4] (District Court Ruling at 6).

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[3] This form, which was introduced at the suppression hearing as Government's Exhibit D (Tr. 226), was discussed with, read to, and signed by Arlo Lewis, only after Special Agent Miller, a law enforcement officer with over 24 years' experience (Tr. 216), had taken great care to assure himself that Lewis understood the consequences of making a statement and was acting intelligently and voluntarily. (Tr. 227-228).

[4] Government's Exhibits E and F.

ARGUMENT

I.

The affidavit, which sets forth the fact that an eyewitness-victim identified the appellant as one of two robbers who commited a bank robbery in his presence, was clearly sufficient to provide probable cause for a warrant to arrest the appellant.

The District Court properly rejected the appellant's attack on the sufficiency of the affidavit in support of the warrant for his arrest. That affidavit, the Government respectfully submits, was plainly sufficient to establish probable cause for appellant's arrest. The affidavit sets forth that the Windsor branch of the United Bank and Trust Company was robbed on July 10, 1976 by two Black males; that a confidential informant had informed the affiant that one of the robbers was named "Arlo"; and that the appellant, Arlo Lewis, fit the general description of one of the robbers. The affidavit then went on to state:

> "On July 16, 1976 this affiant and agent Harry Willis showed a series of seven like police photographs to a one Joseph Lupacchino, manager of the United Bank and Trust Company, who was present during the armed robbery. Mr. Lupacchino identified the photograph of Arlo Lewis as being one of the bank robbers . . . that held him up on July 10, 1976."

Putting aside everything else which appears in the affidavit, this paragraph alone provides a sufficient basis for a finding of probable cause.

Probable cause is, after all, a common sense concept. Whether it exists must be determined "on factual and practical consideration of everyday life. . . ." *United*

States ex rel. DeNegris v. *Menser*, 247 F. Supp. 826, 830 (D. Conn. 1965), *aff'd* 360 F.2d 199 (2d Cir. 1966). It does not require a showing of proof beyond a reasonable doubt, but requires that "[o]nly a probability of criminal activity" be shown. *United States* v. *Gimelstob*, 475 F.2d 157, 160 (3d Cir. 1973). *United States* v. *Mulligan*, 488 F.2d 732, 736 (9th Cir. 1973). To contend, as appellant does, that Joseph Lupacchino's identification of him as one of the bank robbers is *not* enough to support a finding of probable cause is, in effect, to contend that a greater quantum of proof is required to arrest than is required to convict. This plainly is not so. Since the appellant properly could have been *convicted* on the basis of Lupacchino's identification standing alone, it only stands to reason that this identification standing by itself formed a sufficient basis for a finding of probable cause. Indeed, other courts have so held. *See, e.g.*, *United States* v. *Smith*, 467 F.2d 283, 284 (9th Cir. 1972) (Per Curiam), *cert. denied*, 410 U.S. 912 (1973); *United States* v. *Bell*, 457 F.2d 1238, n.3 (5th Cir. 1972); *United States* v. *Thweatt*, 433 F.2d 1226, 1228 (D.C. Cir. 1970); *Miller* v. *United States*, 354 F.2d 801, 808 (8th Cir. 1966). *Cf. United States* v. *Burke*, 517 F.2d 377, 380 (2d Cir. 1975) (Friendly, J.) (holding that the *Aguilar-Spinelli* test is inappropriate in cases "where the information comes from an alleged victim of or witness to a crime") and *United States* v. *Rollins*, 522 F.2d 160, 164 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976).[5]

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[5] Appellant's contention that "eyewitness identification is notoriously unreliable" does not really address itself to the issue of whether an eyewitness identification forms a sufficient basis for a finding of probable cause. The appropriate time to attack such an identification is at trial, before a jury, when the issue is whether the government has proved its case beyond a reasonable doubt. Parenthetically, the government also notes that in this case the eyewitness identification was accurate, since by his own admission at the suppression hearing, Arlo Lewis did in fact rob the bank. (Tr. 94).

The government concedes that Detective Overstrom's affidavit is not a model of draftsmanship. But there is no requirement that it be. As the Supreme Court stated:

> "the Fourth Amendment's command, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." *United States* v. *Ventresca*, 380 U.S. 102, 108 (1964).

If judged by the common sense standard required by Ventresca, the affidavit in question is clearly sufficient. See also, *United States* v. *Conti*, 361 F.2d 153, 156 (2d Cir. 1966), *vacated on other grounds*, 390 U.S. 204 (1968).

On the basis of the foregoing, it is submitted that the District Court correctly concluded that the warrant in question was valid.

II.

Detective Overstrom's innocent failure to indicate in his affidavit that certain persons whom he interviewed were unable to make any identification from a photographic spread neither diminishes the significance of the photographic identification which one eyewitness was able to make, nor does it render the arrest warrant invalid.

Appellant's contention that Detective Overstrom's affidavit was defective by reason of certain allegedly material factual omissions was also properly rejected by the District Court. Prior to obtaining a warrant for the arrest of Arlo Lewis, Detective Overstrom displayed a spread of seven photographs, one of which was of Arlo Lewis, to two bank employees and three customers of the bank, all of whom were in the bank at the time of the robbery. In addition, Detective Overstrom showed the photographic spread to two other individuals, non-witnesses who had reportedly seen two Black males in the vicinity of the bank at relevant times. Of these seven persons, only Joseph Lupacchina, the manager of the bank, was able to make an identification. Lupacchino identified the photograph of Arlo Lewis. Detective Overstrom included in his affidavit the fact that Lupacchino had identified Arlo Lewis. He failed, however, to include that six other persons had been unable to make an identification. It was stipulated between the parties that in so doing, Detective Overstrom "did not intend to deceive or mislead the Judge to whom the affidavit was addressed, or anyone else, [rather] he consciously failed to include this information because he did not feel it was relevant."

(See District Court Ruling at 5, n.18; Stipulation, Appellant's Appendix at 5b-5c).[6]

In analyzing the effect of this omission from Overstrom's affidavit, the District Court applied the same criteria approved by this Court in evaluating the effect of *misstatements* within affidavits:

> "In recent years, federal courts have permitted a defendant to delve below the surface of a facially sufficient supporting affidavit to test its accuracy. *See, e.g., United States* v. *Carmichael*, 489 F.2d 983 (7th Cir. 1973) (*en banc*). *See generally*, Kipperman, *Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence*, 84 Harv. L. Rev. 825 (1971). In most instances, the claim has been that the supporting affidavit contained a misrepresentation of fact. In those cases, the courts have established two general criteria for assessing the effect of a misrepresentation on the

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[6] By stipulating to the facts set forth in the stipulation, the government in no way concedes their relevance of materiality to the issue of probable cause. To the contrary, it is the government's position that the inability of some people who were in the bank at the time of the robbery in no way diminishes the force of Lupacchino's positive identification. Similarly, the inability of people who were *not even* in the bank at the time of the robbery to recognize anyone in a spread of photographs is also irrelevant and immaterial to the issue. *Moreover, it should be emphasized that this is not a case wherein some witnesses misidentified photographs.* With the exception of Lupacchino, the other persons described in the stipulation simply were unable to identify anyone. Rather than reflecting upon Lupacchino's identification, as the appellant suggests, the government submits that the inability of these other individuals to make any identification reflects only upon their own recollection and opportunity to observe. In short, the government maintains that Detective Overstrom was correct in regarding this information as irrelevant. *Cf. United States* v. *Ventresca*, 380 U.S. 102, 108 (1964).

> ensuing arrest or search. The first criterion looks to the culpability of the affiant. The inquiry is whether the misrepresentation resulted from a purposeful intent to deceive the issuing judicial officer or was merely an innocent or negligent mistake. The second criterion tests whether the misrepresentation was material to a finding of probable cause. The Second Circuit has held that the warrant is defective if the misrepresentation is either material or was purposefully intended to deceive the issuing judicial officer. *United States* v. *Pond*, 523 F.2d 210, 213 (2d Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976); *United States* v. *Gonzalez*, 488 F.2d 833, 837 (2d Cir. 1973). *Accord*, *United States* v. *Thomas*, 489 F.2d 664, 669 (5th Cir. 1974); *United States* v. *Marihart*, 492 F.2d 897 (8th Cir.), *cert. denied*, 419 U.S. 827 (1974). While the present concern is with an *omission* from an affidavit rather than the inclusion of a misrepresentation, I find the same criteria are applicable. *Morris* v. *Superior Court*, 57 Cal. App. 3d 521 (1976)." (District Court Ruling at 14-15).

Since there was absolutely no evidence of "police misconduct" on the part of Overstrom, and since, as the stipulation indicates, he "did not intend to deceive or mislead" anyone, the District Court properly held that "there is no basis for finding the affidavit defective on the grounds of the culpability of the affiant." (District Court Ruling at 15). This conclusion, it is submitted, is both sound and in complete accord with the policy of *United States* v. *Ventresca*, *supra*. It should, therefore, be sustained.

With respect to the second criterion, which deals with the materiality of omissions from an affidavit, the District Court also properly concluded that, even if it were

to have been included, "the omitted information does not sufficiently diminish the force of Luppachino's [sic] identification to negate probable cause." (District Court Ruling at 16). This conclusion, the government submits, is compelled by the fact that Lupachino's identification *standing alone* supplied all the probable cause which was necessary. He was there. He was an eyewitness. He was a victim. And he had no motive to lie. From the fact that he was able to make an identification, it can, and should, be inferred that he had an adequate opportunity to observe the appellant's face. (The *inability* of other persons to make any identification supports no such inference.) *Cf. United States* v. *Smith*, 467 F.2d 283, 284 (9th Cir. 1972) (Per Curiam), *cert. denied*, 410 U.S. 912 (1973); *United States* v. *Bell*, 457 F.2d 1238, n.3 (5th Cir. 1972); *United States* v. *Thweatt*, 433 F.2d 1226, 1228 (D.C.Cir. 1970); *Miller* v. *United States*, 354 F.2d 801, 808 (8th Cir. 1966). Additionally, Lupacchino's identification of a photograph of a man named "Arlo" was bolstered further by the fact that an informant was reported to have heard that one of the bank robbers was named "Arlo", a rather uncommon name. On the basis of the foregoing, together with the other supplementary information contained in the affidavit, the District Court quite correctly concluded that the omitted information was not material, and would not have negated the probable cause even if it had been included in the affidavit.

The three cases on which the appellant relies in support of his claim that Overstrom's omission constitutes a fatal defect in the affidavit are, the government submits, patently distinguishable. Each of those cases, *United States* v. *Averell*, 296 F. Supp. 1004 (E.D.N.Y. 1969); *Morris* v. *Superior Court*, 57 Cal. App. 3d 521, 129 Cal. Rptr. 238 (5th Dist. 1976); and *People* v. *Barger*, 40 Cal. App. 3d 662, 115 Cal. Rptr. 298 (1st Dist. 1974),

involved situations in which a police officer deliberately suppressed information which bore upon the credibility of an informant, hence providing at least an arguable basis from which to infer that the affiant knew, or should have known, that the information placed before the issuing judge or magistrate was *untruthful.* It is axiomatic that an affiant cannot knowingly use such information. *See generally,* Kipperman, *Inaccurate Search Warrant Affidavits As a Ground For Suppressing Evidence,* 84 Harv. L. Rev. 825, 829, n.39 (1971). But this, as the District Court specifically found, is plainly not such a case. Nor does the omitted information even touch upon the issue of Lupacchino's credibility.

Parenthically, the government maintains that *United States* v. *Averell, supra,* the single federal case upon which the appellant relies, actually *supports* the government's position by focusing on the practical problems likely to result from a rule requiring law enforcement officers to incorporate extensive detail into affidavits. As the *Averell* court observed in rejecting a claim with infinitely more basis than the appellant's:

> "That the strengths and weaknesses of the government's case were not all set forth in the affidavits does not appear to be reason to invalidate the search warrants. If this were the case, most affidavits would be lengthy briefs, carefully arguing the inferences to be drawn from every fact presented. The miscroscopic examination which defendants have made in order to impugn these affidavits is not in keeping with the 'common sense and realistic' approach mandated by *Ventresca.*" *Id.* at 1019.

Averell's reasoning, it is suggested, applies with equal force in the present case, for if Detective Overstrom were required to set forth in his affidavit the fact that some

people had been unable to identify anyone from the photographic spread, it would also be necessary for him to set forth detailed information such as the opportunity which each such person had to observe the robbers, the opinion of each such person as to his or her own powers of perception and observation, and such mundane things as whether each such person was wearing glasses at the time. All of this, at the very least, would be necessary to dispel the erroneous implication that each person was able as another to observe and to recall. Affidavits would then become treatises.

The District Court, in sum, properly concluded that the affidavit was sufficient, and that the warrant based upon it was valid.

III.

The District Court's finding that the appellant voluntarily, knowingly, and intelligently confessed to the Federal Bureau of Investigation on the evening of his arrest is not "clearly erroneous" and is strongly supported by the totality of the circumstances.

On the date of his arrest, Arlo Lewis made three separate statements to law enforcement officers. The first statement, made shortly after his arrest on the morning of July 16, 1976, was given to FBI Agent Harry Willis, who asked the appellant when he had last seen Wayne Brown. The appellant, who moments earlier had been advised of his rights twice and had indicated that he did not desire to make a statement, thereupon replied that he had seen Brown on the day of the robbery. The second statement was made to Hartford Police Detective Edgar Campbell in the "lockup" area of the police

station late that afternoon. During the course of a lengthy conversation, which Lewis himself initiated, he fully admitted his participation in the bank robbery to Campbell. Detective Campbell, however at no time advised the appellant of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The third statement was a written and signed confession given by the appellant to Special Agent David Miller at approximately 10:05 p.m., on the same evening after he had been fully advised of his rights, and after he had executed an "Interrogation Advice of Rights Form," acknowledging that he fully understood his actions.

After presiding over a two day hearing at which eleven witnesses, including the appellant, testified, the District Court issued an order suppressing the appellant's statements to Agent Willis and Detective Campbell, but denying his motion to suppress the confession to Agent Miller on the evening of Saturday, July 16, 1976, on the grounds that the decision to confess was made "voluntarily, knowingly and intelligently." (District Court ruling at 30). The precise issue before this court is whether that finding is "clearly erroneous."[7] The government maintains that

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[7] The government does not challenge the District Court's suppression of Arlo Lewis' statement to Special Agent Harry Willis on the morning of his arrest. Hence, that aspect of the Court's ruling is not in issue. Nor does the government challenge the District Court's conclusion that, by failing to advise the appellant of his rights, Hartford Police Detective Edgar Campbell committed a technical violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). However, with respect to the Court's suppression of the appellant's statement to Detective Campbell on the afternoon of his arrest, several observations are in order. First of all, there is absolutely no evidence that Campbell was aware of appellant's earlier unwillingness to speak to the FBI. As a matter of fact, the transcript of the District Court proceeding indicates exactly the contrary. Campbell testified that "at least ten times" during the course of the conversation Lewis told Campbell that

[Footnote continued on following page]

it is not. Moreover, the government submits that each of the arguments the appellant makes in this court was raised in, and properly rejected by, the District Court.

A.

Appellant's confession to FBI Special Agent Miller on the evening of July 16th is not inadmissible by virtue of the fact that early on that same morning the appellant had declined to make a statement until he had first seen an attorney.

On the morning of his arrest, Arlo Lewis was properly advised of his constitutional rights on three separate occasions. The fact that he initially declined to make a statement until he saw a lawyer, indicates that he understood those rights. Although he claimed at the suppression hearing to have been in need of medical attention and

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he had already confessed to the FBI. (Tr. 188-189). Thus, Campbell's failure to advise Lewis of his rights is understandable.

Secondly, despite appellant's assertion, there is absolutely no evidence that Detective Campbell "tricked" Lewis into incriminating himself (Appellant's Brief at 8), or that Campbell ever "lied" to the appellant. (Appellant's Brief at 10). In support of this assertion appellant purports to rely on footnote 6 of the District Court Ruling. That footnote, in turn, refers to the trial court transcript at 199. Examination of that page of the transcript does not support appellant's accusation. Nor does any other page of the transcript. In short, the District Court *never* found that Campbell "lied" or that he "tricked" the appellant. Indeed, the District Court specifically found that Campbell's conduct was "not particularly overbearing." (District Court Ruling at 23). Because of appellant's gross mischaracterization of the conversation between him and Campbell, the government has reprinted, for use as an index to Campbell's testimony, a portion of its proposed findings of facts which were submitted to the District Court. (See Government's Appendix at ....).

suffering throughout the day from heroin withdrawal symptoms, there is no evidence that his judgment was impaired at any time on July 16, 1976.[8]

Later, while at the "lockup" of the Hartford Police Department, the appellant saw Detective Edgar Campbell, whom he knew as a street acquaintance and with whom he had enjoyed a cordial relationship since approximately 1973. (Tr. 179-181). Appellant initiated a conversation with Campbell by asking him to deliver a message to his girlfriend. During the course of this conversation, the appellant freely admitted his participation in the robbery,

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[8] Appellant's testimony that he asked for medical attention at the time of his arrest was categorically denied by Detective Overstrom (Tr. 166); Agent Willis (Tr. 130-131); and Agent Miller (Tr. 224-225; 233-234; 242). Appellant's claim that he was ill and requested medical assistance from Detective Campbell was also denied by Campbell. (Tr. 194-195). And appellant's claim that he was severely ill from withdrawal sickness and was suffering from a "stab wound" was contradicted by his own witness, Doctor Louis Tonken, who indicated that appellant was not suffering from advanced withdrawal symptoms and that his stab wound was "superficial" (Tr. 32, 23, 26-40). As the District Court found:

> "The defendant made no medical requests of any of the officers to whom he spoke during the day. He had been treated in the afternoon at the Hartford Hospital for a small knife wound. At that time, he did not complain of narcotics withdrawal. Transcript at 116-17. Finally, he had been treated by the Hartford police's doctor a half-hour before he spoke to Agent Miller and the doctor did not find that he was suffering from an advanced stage of withdrawal. In any event, he had been treated before he spoke to Special Agent Miller. The defendant's expert testified that this treatment would provide comfort within a short period of time. Transcript at 260. Thus, the defendant's claim that his judgment was impaired is not supported by the evidence. Nor does the record support his claim that he confessed in return for a promise of medical treatment." (District Court Ruling at 29, n.30).

telling Campbell that he had already confessed to the FBI, except for telling them the possible whereabouts of the stolen money and the gun used by his accomplice, Wayne X. Brown. Campbell advised Lewis that, since he had already given a confession to the FBI, "he might as well tell them everything." (Tr. 189). At the conclusion of this conversation, appellant produced the business card of Special Agent Harry Willis and specifically requested that Campbell call him. "Campbell indicated reluctance to contact the agent on a Saturday night," but as the District Court found, "Lewis persuaded him to do so." (District Court Ruling at 29).

Agent David Miller arrived approximately two hours later. Prior to questioning the appellant, Miller again advised him of his constitutional rights. This was the *fourth* time that day that appellant was so advised. At no time did the appellant claim to be ill or appear ill. (Tr. 230-232; Government's Exhibit G, Interview Log). Between approximately 8:20 and 8:30 p.m., Agent Miller talked to the appellant in detail in order to assure himself that he knew exactly what he was doing and that he was knowingly waiving his right to counsel. (Tr. 227-228). The appellant thereupon gave a complete confession, which he signed at approximately 10:05 p.m., after reading it aloud. (Tr. 232). After a complete and impartial consideration of the "totality of the circumstances" leading up to that confession, the District Court concluded that it was volunarily and knowingly given:

> "Two hours passed before Special Agent Miller arrived. This was sufficient time for Lewis to reconsider his decision to talk. Furthermore, and most importantly, Lewis confessed only after he was fully informed of his rights for the fourth time that day. He was then entirely free to evaluate the situation and consider whether he

> wanted to talk. Indeed, Agent Miller, aware that Lewis had earlier wanted to consult with counsel, took special care in advising him of his rights in order to assure himself that the defendant 'knew exactly what he was doing.' Special Agent Miller also inquired about the defendant's physical condition. Based upon that inquiry, he became con vinced that Lewis was in full possession of his faculties. I also find that the defendant's physical condition did not impede his judgment. Fully cognizant of the special scrutiny that must be paid to Lewis' decision to change his mind and the 'heavy burden' which rests upon the Government, I find that the defendant's decision was made 'voluntarily, knowingly and intelligently.' *Cf. United States* v. *Duvall*, 537 F.2d 15 (2d Cir. 1976)." (District Court Ruling at 29-30). (Footnotes omitted).

This finding is no "clearly erroneous" and should not, therefore, be disturbed. *United States* v. *Boston*, 508 F.2d 1171, 1179 (2d Cir. 1975); *United States* v. *Rothberg*, 460 F.2d 223, 226-227 (2d Cir. 1972) (Mansfield, J., dissenting); 8A J. Moore, *Federal Practice* ¶ 41.10, n.8 (Cipes ed.). *Cf. Walling* v. *General Industries Co.*, 330 U.S. 545, 550 (1947).

The only remaining question is whether the District Court erred as a matter of law in refusing to adopt a per se rule precluding further interrogation once a suspect has indicated an unwillingness to talk without having counsel present. The government respectfully submits that it did not.

Although *Michigan* v. *Mosley*, 423 U.S. 96 (1975) was not addressed precisley to the issue of whether an interrogation could be resumed after an accused has once expressed a desire to consult with counsel, 423 U.S.

at 101, n.7, the Court's refusal to preclude any further interrogation after an accused has once claimed the closely-related right to remain silent indicates a "willingness to import a greater degree of flexibility in the application of *Miranda* to varying factual situations." *United States* v. *Pheaster*, 544 F.2d 353, 367 (9th Cir. 1976). A fair reading of *Mosley* indicates that the Court sought to achieve this flexibility through the elimination of the very same type of per se preclusions and "blanket prohibitions" which appellant urges this Court to create. As the Court in Mosley indicated:

> "[A] blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." *Id.* at 102.

The District Court, it is submitted, properly applied this reasoning to the present case and correctly rejected a per se rule precluding renewed questioning.

Other courts have done the same in similar contexts. In *United States* v. *Cavallino*, 498 F.2d 1200 (5th Cir. 1974), the Court upheld the admissibility of a confession given approximately one and one-half hours after the defendant said he wanted to talk to an attorney. The renewed interrogation took place after the defendant sent a message that he wanted to speak to the authorities. Questioning was conducted by the same officer who had initially questioned the defendant, and concerned the same crimes. The Court disposed of defendant's claim as follows:

> "Cavallino argues that once he expressed his desire to have a lawyer, a knowing and intelligent waiver of his *Miranda* rights was impossible, or, alternatively, that such a waiver could be found only if he expressly stated he no longer desired a lawyer.
>
> We reject appellant's argument because the critical inquiry is whether the prosecution has sustained its heavy burden of establishing that Cavallino was fully informed of and understood his rights and whether, having once expressed his decision to exercise them, he later changed his mind and knowingly and understandingly declined to exercise them. *Hill* v. *Whealon*, 6 Cir. 1974, 490 F.2d 629; *United States* v. *Anthony*, 5 Cir. 1973, 474 F.2d 770; *United States* v. *Collins*, 2 Cir. 1972, 462 F.2d 792; *United States* v. *Hopkins*, 5 Cir. 1970, 433 F.2d 1041." *Id.* at 1202.

Also see *United States* v. *Pheaster*, *supra*, (decided approximately one month after *United States* v. *Flores-Calvillo*, 19 Cr. L. Rptr. 2405 (9th Cir., July 14, 1976) (*pending petition for rehearing en banc*); and *United States* v. *Clark*, 499 F.2d 802, 806-807 (4th Cir. 1974).

The circumstances of the present case are even more favorable to the government than those present in *Cavallino*, *Pheaster*, and *Clark*. Here the appellant clearly understood his rights, for he had previously exercised them on that same day. Despite his various claims to the contrary, which the District Court found to be incredible, the appellant suffered no impairment of judgment as a result of addiction, illness, or injury. Although he was in custody there is no evidence, nor even an allegation, that the conditions of his confinement undermined his resistance. Nor was he hit, threatened or verbally abused. During the course of a conversation

he had with Detective Campbell later in the day, he talked freely and openly about his involvement in the robbery, ultimately *persuading* Campbell to contact the FBI on his behalf.

Nearly twelve hours after he was initially arrested and advised of his rights, Special Agent Miller arrived at the police station. Before beginning the reinterview, *which appellant himself initiated*, Miller readvised him of his rights, going to extraordinary lengths to assure himself that the appellant "realized exactly what he was doing." (Tr. 227). Appellant then signed a written waiver of his rights and proceeded to give a detailed written confession,[9] which he read before signing at 10:05 p.m.

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[9] Appellant's claim that he confessed out of "frustration and disbelief in the possibility of ever seeing an attorney" (Appellant's Brief at 11) is belied by his own testimony at the suppression hearing. Like the defendant in *Cavallino, supra*, 498 F.2d at 1202, Arlo Lewis had been "this route before." No stranger to the halls of justice, Lewis knew his rights well, as the following indicates:

Q. Now, you've been arrested before, haven't you?
A. Yes.
Q. And you've been in the court system of the State of Connecticut before, correct?
A. Yes.
Q. You've had a public defender appointed before?
A. Yes.
Q. And you've been down in the Court of Common Pleas 14 down in Morgan Street before, is that correct?
A. Yes.
Q. Now, do you have any experience how lawyers are appointed for defendants down there?
A. Yes.
Q. Can you just briefly tell the Court how that works?
A. Well, first, you go before the Judge and you request to have a public defender. And then they give you—they ask

[Footnote continued on following page]

On the basis of the foregoing, the District Court's finding of voluntariness is not only not "clearly erroneous," it is clearly correct.

B.

Appellant's claim that he confessed to FBI Special Agent Miller only because he had previously given an unwarned confession to a Hartford police officer is unsound as a matter of law and in direct conflict with the District Court's findings of fact.

The fact that defendant's confession to Agent Miller followed by over two hours his unwarned statements to Detective Edgar Campbell does not in any way preclude a finding of voluntariness as a matter of law. Causation has never been the test of voluntariness. *Terrell Don Hutto, Commissioner, Arkansas Department of Corrections* v. *Ross*, — U.S. — (1976) (Per Curiam), 20 Cr. L. Rptr. 4052 (November 3, 1976). Even if the appellant's claim that he only confessed to Miller because he had previously confessed to Campbell were viewed as credible, this Circuit has unequivocally rejected the "cat-out-of-the-bag-theory."

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you some questions as to whether, you know, you can afford a regular lawyer or not, you know. And then they give you a form to fill out.

Q. Okay. Now, you were arrested on Saturday morning, correct?

A. Yes.

Q. To your knowledge, was the court open on Saturday morning?

A. No.

Q. When did you think this lawyer would be appointed for you, if one indeed was appointed?

A. Monday. (Tr. 73-74).

> "In the instant case appellant in effect argues for the adoption of a per se rule which would require an automatic finding of involuntariness with respect to any statement made in custody by an individual fully informed of his constitutional rights if at some earlier time the individual had made inculpatory remarks without the benefit of complete *Miranda* warnings unless at the subsequent interrogation that individual is specifically informed that his earlier statements are inadmissible in any criminal proceedings that may be brought against him.
>
> * * * *
>
> [W]e reject this mechanistic approach and adhere to the established rule that the voluntariness of any custodial statement must be determined from an examination of the totality of particular facts surrounding its making. See, *Clewis* v. *Texas*, 386 U.S. 707 (1967); *United States* v. *Bayer*, 331 U.S. 532, 539-41 (1947); *United States* v. *Mullens*, 536 F.2d 997, 1000 (2d Cir. 1976); *Knott* v. *Howard*, 511 F.2d 1060 (1st Cir. 1975) (*per curiam*). Cf., *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 223-27 (1973); *Collins* v. *Brierly*, 492 F.2d 735 (3d Cir.) (*en banc*), *cert. denied*, 419 U.S. 877 (1974); *Tanner* v. *Vincent*, 541 F.2d 932, 936-937 (2d Cir. 1976).

The District Court, therefore, correctly concluded that a prior unwarned confession does not automatically render subsequent, otherwise lawful, confessions inadmissible. Rather, it is but one factor to be considered among the "totality of circumstances." *Cf. United States ex rel. Stephen J. B.* v. *Shelly*, 430 F.2d 215 (2d Cir. 1970).

Judge Blumenfeld thoroughly considered this factor and ultimately concluded that it was "outweighed by other

factors which indicate . . . that Lewis' decision to speak to Miller was voluntary." He then went on explicity to find:

> "I accord little weight to the fact that Lewis had already confessed to Campbell. I do not believe Lewis' statements to Miller were motivated or caused by the earlier confession. Lewis' testimony to this effect is, in my opinion, an afterthought and not credible. Transcript at 90. My belief is that he chose to speak to Miller because he felt it was in his best interest to do so. His confession to Miller, therefore, was not tainted by anything that occurred during his conversation with Campbell." (District Court Ruling at 28, n.29).

This finding is not "clearly erroneous." It is fully and strongly supported by the record of the proceedings in the District Court. It should not be disturbed. *United States* v. *Boston*, 508 F.2d 1171, 1179 (2d Cir. 1975); *United States* v. *Rothberg*, 460 F.2d 223, 226-227 (2d Cir. 1972) (Mansfield, J., dissenting); 8A J. Moore, *Federal Practice*, ¶ 41.10, n.8 (Cipes ed.). *Cf. Walling* v. *General Industries Co.*, 330 U.S. 545, 550 (1947).

CONCLUSION

The District Court's ruling is legally sound and factually correct. Its order denying appellant's suppression motion should therefore be affirmed.

Respectfully submitted,

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GOVERNMENT'S APPENDIX

APPENDIX

1. Edgar Campbell is a detective with the Hartford Police Department and has been employed as a police officer for six years (Tr. 178).

2. Prior to becoming a detective approximately sixteen months ago, Campbell served as an undercover narcotics officer for approximately eight months (Tr. 180).

3. Before serving on the narcotics squad, Detective Campbell was also a "beat man" from 1973 to 1975 and was assigned to walk in the area of Sigourney Street in Hartford (Tr. 179-180).

4. Detective Campbell first met Arlo Lewis while Campbell was assigned to the Sigourney Street beat (Tr. 180).

5. During the period of Campbell's assignment to the Sigourney Street beat, he saw Arlo Lewis at least two or three times per week (Tr. 180).

6. Campbell frequently talked with Arlo Lewis during this period of time, exchanged pleasantries with Lewis on the street, and teased Lewis about his hair, which Campbell regarded as neat, unique, and beautiful (Tr. 180-181, 206).

7. Campbell's relationship with Arlo Lewis during this period of time was cordial and friendly (Tr. 181).

8. After Campbell's reassignment away from the Sigourney Street beat he still occasionally saw Arlo Lewis, made small talk with him, and continued to kid Lewis about his hair (Tr. 182).

9. At approximately 5:30 to 5:45 p.m. on Saturday, July 17, 1976, Edgar Campbell was at the Hartford Police Station, having reported to work at 4:00 p.m. that afternoon (Tr. 182-183).

10. Campbell was in the process of putting a prisoner in the "lockup" located in the police station when he heard a voice call the name "Campbell" from another detention cell (Tr. 184).

11. At the time Campbell initially heard this voice call out, he had no idea who was calling his name, since from where Campbell was standing one cannot see into the detention cells themselves (Tr. 184, 202).

12. Campbell inquired as to who had called him, and the voice responded, "It's Arlo . . . Let me out of here, I want to talk to you." (Tr. 184).

13. Detective Campbell then let Lewis out of his cell, permitting him to walk into a larger, outer-cell and over to Campbell, who stood on the opposite side of the bars (Tr. 184).

14. Campbell inquired as to what Lewis was doing in the Hartford lockup, and Lewis replied to the effect that he was being detained on Hartford rearrest warrants (Tr. 185).

15. Lewis then asked Campbell to do a favor for him (Tr. 185).

16. Arlo Lewis asked Detective Campbell if he would contact Lewis' girlfriend, "Sunshine", whom Campbell also knew from having walked the Sigourney Street beat, and advise her that Lewis would not be going to court in Windsor on Monday morning, but would instead be in court at Hartford (Tr. 181-182, 185).

17. Lewis explained that "Sunshine" was expecting a child, and he did not want her to worry about him (Tr. 185).

18. Campbell agreed to do this favor for Arlo Lewis, and ultimately did, in fact, convey this message to "Sunshine" (Tr. 185, 197-198).

19. During the course of this conversation, Arlo Lewis brought up the subject of the robbery of the Windsor branch of the United Bank and Trust Company (Tr. 186).

20. Detective Campbell did not advise Arlo Lewis of his constitutional rights at this, or any other, juncture of the conversation because on at least ten instances during the conversation Lewis specifically stated that he had already confessed everything to the FBI, except as to the possible whereabouts of the stolen bank money and the gun used by his accomplice (Tr. 188-189).

21. Additionally, Campbell did not advise Arlo Lewis of his constitutional rights because it was not his case, neither he nor the Hartford Police Department had played any role in the investigation of the robbery, he believed that both the Windsor Police Department and the FBI had been through the advice of rights procedure with him, and he did not at any point interrogate or otherwise question Lewis about that robbery (Tr. 186, 189, 192, 204).

22. Campbell and Arlo Lewis spoke together for in excess of one-half hour on the evening of July 17, 1976, with Arlo Lewis doing approximately 95% of the talking (Tr. 192).

23. During the course of this conversation, Lewis admitted that he and Wayne Brown robbed the Windsor

branch of the United Bank and Trust Company on July 10, 1976, that Brown had held the gun on the bank employees, and that he (Lewis) had vaulted the counter (Tr. 186-187).

24. Subsequently, at the suppression hearing, Arlo Lewis testified that his confession to Campbell was truthful and that he and Wayne Brown had in fact robbed the Windsor branch of the United Bank and Trust Company on July 10, 1976 (Tr. 93, 94).

25. During the course of his conversation with Campbell, Lewis stated that he thought he might know the whereabouts of the stolen bank money and the gun used by Wayne Brown, but that he had not given this information to the FBI (Tr. 189, 191).

26. The only advice given by Campbell was that, since Lewis had already given a confession to the FBI, he "might as well tell them everything", namely whatever information he had concerning the gun and the bank money (Tr. 189).

27. At no time did Campbell state that either he or the FBI would help him, or that things would "go easier" for him, if Lewis provided this information (Tr. 191).

28. Lewis then produced a business card which had previously been given to him by FBI Agent Harry Willis, and specifically requested that Detective Campbell call Willis so that Arlo Lewis could talk to him (Tr. 190).

29. Campbell refused to contact the FBI, advising Lewis that if he (Lewis) wanted to speak to Agent Willis, he (Campbell) would contact the Windsor Police and have them contact Willis (Tr. 190-191).

30. Campbell told Lewis that he did not want to call anyone at home on a Saturday evening and have them come down to the Hartford Police Station unless Lewis was sure that he was going to give them the information about the gun and money (Tr. 191).

31. Lewis responded that he wanted to talk to Agent Willis (Tr. 190).

32. Lewis then handed Campbell a card with FBI Agent Harry Willis' phone number on it, and instructed Campbell to call the Windsor Police with the request that they contact the FBI (Tr. 191).

33. Pursuant to Lewis' request, Detective Campbell contacted the Windsor Police Department, which in turn contacted the FBI (Tr. 191).

34. Edgar Campbell's conversation with Arlo Lewis terminated approximately between 6:30 and 6:45 p.m. on Saturday July 17, 1976 (Tr. 209).

35. During the conversation between him and Arlo Lewis, Detective Campbell stood no more than two feet away from Lewis, and had ample opportunity to observe his condition and demeanor (Tr. 192-193).

36. From his experience as a narcotics officer, Detective Campbell is familiar with the symptoms of withdrawal from narcotics (Tr. 180).

37. At no point during the conversation between Arlo Lewis and Edgar Campbell did Arlo Lewis look sick, act sick, state he was sick, or request medical attention (Tr. 194).

38. At no time during the conversation with Edgar Campbell did Arlo Lewis manifest a runny nose, watery eyes, cramps, or any other symptom of narcotics withdrawal (Tr. 195).

39. At no time during the conversation with Edgar Campbell did Arlo Lewis appear to have any difficulty understanding Campbell, nor did Detective Campbell have any difficulty understanding Lewis (Tr. 195).

40. At no time during the conversation with Edgar Campbell did he or any other police officer to his knowledge, hit, threaten, verbally abuse, or attempt to trick Arlo Lewis into talking (Tr. 195).

41. At no point did Edgar Campbell interrogate Arlo Lewis or attempt to elicit incriminating statements from him (Tr. 192).

42. In speaking with Arlo Lewis, Edgar Campbell was acting independently, and had not been requested to do so by either the FBI or the Windsor Police Department.

43. Detective Campbell made no notes of his conversation with Arlo Lewis, and even to this date has not prepared a police report of his interview with Lewis (Tr. 210-211).

44. It was not until well after his discussion with Arlo Lewis had concluded that Detective Campbell first learned that Arlo Lewis had not in fact previously given a statement to the FBI (Tr. 211).

45. Neither Detective Campbell, nor the Hartford Police Department, participated in the investigation of the July 10, 1976, robbery of the Windsor branch of the United Savings Bank.

46. There is no evidence that Detective Campbell acted in deliberate disregard of Arlo Lewis' constitutional rights.

47. There is no evidence that Detective Campbell either tricked or attempted to trick Arlo Lewis into providing information concerning his role in the July 10, 1976 bank robbery.

48. There is no evidence that Edgar Campbell's contact with Arlo Lewis was a trick or stratagem engineered by the FBI or Windsor Police Department for the purpose of getting Arlo Lewis to give a confession.

49. Detective Campbell had no bad, improper, or unlawful motive in either talking to Arlo Lewis or in failing to advise him of his constitutional rights.

50. The fact that Detective Campbell neither initiated the conversation, nor questioned Lewis about the robbery, nor prepared any written report of his discussion, but merely indirectly contacted the FBI on Lewis' behalf, indicates that Campbell was functioning as a friendly acquaintance of Arlo Lewis and not as a criminal investigator on the night of July 17, 1976.

51. At no time did Lewis ever state or intimate to Campbell that he desired an attorney or that he was hesitant to talk about the bank robbery.

52. Detective Campbell is an experienced law enforcement officer with no stake in the outcome of the instant litigation and no motive to testify falsely.

53. Detective Campbell testified truthfully and, having viewed his demeanor and heard his testimony, the Court regards his testimony as credible.

54. Arlo Lewis testified incredibly with respect to the length and extent of his previous contacts with Edgar Campbell and several aspects of his conversation with

Campbell on July 17, 1976. The falsity of defendant's testimony with request to these matters diminishes his overall credibility.

55. Arlo Lewis freely and voluntarily admitted his involvement to Edgar Campbell because he had already made up his mind that giving a statement to law enforcement officials would be to his advantage.

56. Although Arlo Lewis testified that he was a heroin addict, there is no credible evidence that at the time of his conversation with Detective Campbell he was suffering from narcotics withdrawal sickness to such an extent that he was unable to comprehend what he was saying.

57. The Court credits the testimony of Detective Edgar Campbell over that of the defendant Arlo Lewis.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 77-1031

U S A,
APPELLEE

v.

ARLO LEWIS,
APPELLANT

AFFIDAVIT OF SERVICE BY MAIL

Patricia O'Hara, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 51 West 70th Street, New York, N. Y. 10023

That on the 28th day of March, 1977, deponent served the within Brief and Appendix upon Richard S. Cramer, Esq., Assistant Federal Public Defender, 450 Main Street, Hartford, Connecticut 06103

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Patricia O'Hara

Sworn to before me,

This 28th day of March, 1977

Edward A. Quimby

EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1977